

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 146 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA and
MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?
1 to 5 No
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GOPAL LAXMAN THAKUR

Versus

STATE OF GUJARAT

Appearance:

MR RAJESH M AGRAWAL for appellants

Mr.P.B.Bhatt, learned Addl.P.P. for Respondent No. 1

CORAM : MR.JUSTICE M.R.CALLA and
MISS JUSTICE R.M.DOSHIT

Date of decision: 27/04/98

ORAL JUDGEMENT (per M.R.Calla,J)

1. This Criminal Appeal is directed against the common judgment and order of conviction and sentence passed by the Addl. Sessions Judge, Court No.14, Ahmedabad on 5.2.90 in Sessions Case Nos.339/89 and 340/89 whereby both Gopal Laxman Thakur - accused in Sessions Case No.340/89 and Ranjit Laxman Thakur accused

in Sessions Case No.339/89 have been convicted for the offence under S.15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act') and each of them has been sentenced to ten years R.I. and a fine of Rs.1,00,000/- in default of the payment of fine to further undergo four months R.I.

2. The complaints Exh.27 and Exh.29 at pages 171 and 213 of the paper book show that on 20.6.89 while the police party of Police Station, Maninagar headed by P.S.I. N.L. Raval, two head constables - Barnabas Peter and Detarbhai Fulabhai and four constables - Dashratsinh Udesinh, Babubhai Malabhai, Balvantsinh Natwarsinh and Ajitsinh Nharsinh Nharsinh were on patrolling duty near Maninagar Railway Station crossing in Ahmedabad they suspected the two appellants. Each of the two appellants was having a gunny bag and they were seen waiting near some shop. Patrolling party found that each of the two appellants was having a bag containing Posh Doda weighing 24 Kgs. On that basis two separate offences i.e. C.R.No.201/89 against appellant - Gopal Laxman Thakur and C.R.No.202/89 against appellant - Ranjit Laxman Thakur was registered and Gopal Laxman Thakur faced the trial for the offence, as aforesaid, under NDPS Act in Sessions Case No.340/89 while Ranjit Laxman Thakur faced the trial in Sessions Case 339/89 for the same offence under the NDPS Act. The Addl. P.P. moved an application for consolidation of the cases and thereupon both the cases were consolidated. The samples which were taken from the contraband material, which was found in the possession of the appellants, were duly sealed and sent to Forensic Science Laboratory. In case of Ranjit Laxman Thakur i.e. C.R.No.202/89 the report of the Forensic Science Laboratory is at Exh.9 under the signatures of Asst. Director, Forensic Science Laboratory cum Asst.Chemical Examiner to the Government of Gujarat, Ahmedabad alongwith the report of the Botanical Examination at pages 95 to 99 of the paper book. In the opinion of the Assistant Director, Forensic Science Laboratory cum Asst. Chemical Examiner the contents have been found to be poppy capsules on the basis of the Physical Examination, Chemical Examination through Mayer test, marquis test, thin layer chromatography pattern as also Botanical Examination report. As is clear from the report dated 5.9.89 and the report of the Botanical Examination dated 1.9.89, the result of the analysis is that the contents of the substance recovered from the possession of the appellant has been identified as fragments of poppy capsule. In case relating to Gopal Laxman Thakur i.e. C.R.No.201/89 the Forensic Science Laboratory Report is at Exh.11 at page 103-105 dated 5.9.89 under the

signatures of Asst. Director, Forensic Science Laboratory cum Asst. Chemical Examiner to the Government of Gujarat, Ahmedabad and the report of the Botanical Examination dated 1.9.89 is at Exh.12 at page 107. The Asst. Director, Forensic Science Laboratory cum- Asst. Chemical Examiner has opined, on the basis of the physical examination, chemical analysis through Mayer test, marquis test and thin layer chromatography pattern as also Botanical Examination, that the substance found from the possession of the appellant was poppy capsule. In the Botanical Examination report also the substance has been found as fragments of poppy capsule.

3. Although the conviction and sentence in case of each of the two appellants has been challenged on more than one grounds, the learned counsel for the appellants has submitted that poppy capsules, as has been found, is not a narcotic substance within the meaning of S.2 of the NDPS Act and, therefore, the conviction and sentence cannot be sustained in the eye of law. Whereas we find that the contention raised on behalf of the appellants is covered by a Division Bench decision of this Court, on which strong reliance has been placed by the learned counsel for the appellants, we do not find it necessary to deal with the other contentions. In the Division Bench decision of our own High Court reported in 1993(2) GLR 1743 (Hathi @ Mangalsinh v. State) the conviction and sentence under S.15 of the NDPS Act was under challenge and the contraband material, which was alleged to have been found in that case, was Posh Doda i.e. the same, as has been found in the present case. In the aforesaid case, the Division Bench considered in detail as to whether the fragments of poppy capsule Posh Doda is covered by the definition of opium poppy under S.2(xvii) of the NDPS Act. While dealing with the question as to whether the substance i.e. fragments of poppy capsule Posh Doda was a poppy capsule as defined under NDPS Act, the Court has found that for a substance to be a poppy straw, it must first be opium or any part thereof. "Opium" itself has been defined in S.2(xv), "opium derivative" has been defined in S.2(xvi), "opium poppy" has been defined in S.2(xvii) and "poppy straw" has been defined in S.2(xviii). The Division Bench held that in view of the definition of "opium poppy" under NDPS Act, the substance to be "opium poppy" must be either the plant of the species *Papaver Somniferum* Linn or any other species of *Papaver* from which opium or any phenanthrene alkaloid can be extracted and such extracted substance may be declared to be opium poppy for the purpose of NDPS Act. According to the aforesaid Division Bench decision

to say that a substance is an "opium poppy", it must be proved by the prosecution that it is either the plant of the species of *Papaver Somniferum* Linn or it is the plant of any other species of *Papaver* from which opium or any phenanthrene alkaloid can be extracted and may have been declared to be opium poppy for the purpose of this Act. In the case of *Hathi @ Mangalsinh v. State* (Supra) the Botanical report was not on record and the Court, therefore, called for the said report and the concerned expert was examined by the Court as a Court witness and the report was taken on record. The Court found that even in the Botanical report, it was shown that specimen was fragments of poppy capsules and the report of the Forensic Science Laboratory did not say that the substance belongs to the species *Papaver Somniferum* Linn and/or species of *Papaver* from which opium or any phenanthrene alkaloid could be extracted. It was also noticed that it was not shown in the report that opium or phenanthrene alkaloid could be extracted from the substance and such extract may be declared opium poppy by the Central Government. The Court found that fragments of poppy capsule (Posh ka Doda) by itself does not become opium poppy. The Division Bench had considered the question in detail and has come to the conclusion that all the members and their species of the family of *Papaveraceae* do not contain morphine and even if some of the species contain morphine, the extent of morphine is a factor to make it a narcotic substance. The Division Bench then considered as to whether the fragments of poppy capsules, as found by the expert of the Forensic Science Laboratory, be said to be "poppy straw" as defined under S.2(xviii) of the NDPS Act. Family of *Papaveranceae* is known as poppy family and all its members, and its species are known as different types of poppy. Therefore, simply because the expert found the substance to be fragments of poppy capsules, it by itself does not become a poppy straw as defined under the NDPS Act. The Court has noticed that the poppy straw as defined in the Act is "all parts (except the seeds) of the opium poppy after harvesting whether in their original form or cut, crushed or powdered and whether or not juice has been extracted therefrom." To bring the fragments of poppy capsules within the mischief of the Act, the poppy capsules must be the parts of opium as defined in Clause (xvii) of S.2 of the NDPS Act. Opium poppy is defined as the plant of the species *Papaver Somniferum* Linn and the plant of other species of *Papaver* from which opium or any phenanthrene alkaloid can be extracted and which the Central Government may, by Notification in the Official Gazette, declare to be opium poppy for the purposes of this Act. The Division Bench

also noticed that the expert had not opined that the fragments of poppy capsules alleged to be found from possession of the accused are the poppy capsules of plant of *Papaver Somniferum* Linn. It was also not opined by the expert that the said fragments of poppy capsules belong to any other species of *Papaver* member of *Papaveraceae* family. Non-mention by the expert as to which species of member of *Papaver* of the *Papaveraceae* family the fragments of *Papaver* capsules found from the accused belong and/or from the said species or member opium or any phenanthrene alkaloid can be extracted and the same may be declared to be opium poppy by notification in the Official Gazette by the Central Government does not bring that substance found within the definition of opium poppy. It was further observed that the substance analysed must be either the plant of the species *Papaver Somniferum* Linn and the plant of other species of *Papaver* from which opium or any phenanthrene alkaloid could be extracted and which the Central Government may, by Notification in the Official Gazette, declare to be opium poppy for the purposes of this Act to show the substance to be poppy straw as defined in NDPS Act and none other members and its species though of *Papaveraceae* family, yet opium cannot be extracted. The Court also stressed the requirements to be so mentioned by the expert for the simple reason that in some of the species of member of *Papaveraceae* family, though morphine can be extracted, it does not contain more than 0.2% in quantity. Other species, from which opium could be extracted, that opium also must satisfy the definition of opium as defined in clause (xv) of S.2 of the NDPS Act and as per that definition morphine extracted from that substance should not be less than 0.2%. Opium poppy is either the plant of species of *Papaver Somniferum* which contains about 10% of morphine and the coagulated juice extracted therefrom is called opium which must contain 0.2% or more of morphine.

4. We have considered the Forensic Science Laboratory reports Exh.9, Exh.11 and Botanical report Exh.12 in C.R. No.201/89 at page 103 and 107 as also the Forensic Science Laboratory Report alongwith Botanical report as contained in Exh.9 in relation to C.R.No.202/89 and we find that all that has been stated in the report is that the substance found was poppy capsules and that it was identified as fragments of poppy capsules. Thus, the reports do not withstand the test laid down by Division Bench in the aforesaid case. Applying the reasoning given in the aforesaid Division Bench judgment in the case of *Hathi @ Mangalsinh v. State* (Supra) we find that the Poppy capsules are not covered either by

the term 'opium' or the 'opium derivative' or 'opium poppy' or 'poppy straw' as defined in S.2(xv) to (xviii).

5. The learned Addl. P.P. has cited 1996(2) Crimes 449 (Sadhu Das v. State of U.P.) - a decision of Allahabad High Court, wherein Affim Ka Doda, which was found to have been recovered from the possession of the accused i.e.. poppy capsules (Posh ka Doda), was found to be a narcotic substance covered by the term 'opium straw'. However, in view of the Division Bench decision of our own High Court, it is not possible to follow the single Bench decision of the Allahabad High Court. Even otherwise, we find that Allahabad High Court has not considered the question with regard to the nature of the substance and its origin or its contents in detail, as has been discussed by the Division Bench of our own High Court in the case of Hathi @ Mangalsinh v. State (Supra). The report of Forensic Science Laboratory and the Botanical report in the case at hand only make a bald statement that the substance was poppy capsules. The opinion so expressed that it was found to be poppy capsules and it was identified as fragments of poppy capsules do not lead to the conclusion that the substance is 'opium' or its 'derivative' or that such opium capsule is 'opium poppy' or 'poppy straw'. In this view of the matter, the conviction and sentence awarded to the two appellants under S.15 of the NDPS Act cannot be sustained in the eye of law.

6. Accordingly this Appeal on behalf of the two appellants succeeds. The conviction and sentence awarded in case of each of the two appellants under S.15 of the NDPS Act are set aside and it is directed that the two appellants, namely, Gopal Laxman Thakur and Ranjit Laxman Thakur be released forthwith, if not required in any other case.